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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

POND FORK OIL & GAS COMPANY, Petitioner

against

ALBERT H. COLE, H. LANGDON LAWES and CHARLES H. STEPHENS, JR., Trustees of the Cole & Crane Real Estate Trust

---

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

HAROLD A. RITZ,
FRANK LIVELY,
Counsel for Petitioner.

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To the Honorable the Chief Justice and Associate Justice of the Supreme Court of the United States:

SUMMARY STATEMENT OF MATTER INVOLVED

In this case was challenged the validity under the Federal Constitution of an act of the Legislature of the State of West Virginia being Chapter 127 of the Acts of the Legislature of 1939.

Prior to the passage of this act, legislation had been enacted levying various taxes upon certain industries and businesses for the benefit of the State,

among which was an act levying a tax upon the business of engaging or continuing in the production for sale or commercial use of natural gas. The pertinent part of this act follows:

> "Section 2a. *Production of Coal and Other Natural Resource Products.*—Upon every person engaging or continuing within this state in the business of producing for sale, profit, or commercial use any natural resource products, the amount of such tax to be equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer, except as hereinafter provided, multiplied by the respective rates as follows: * * * natural gas, in excess of the value of five thousand dollars, six per cent; * * *. The measure of this tax is the value of the entire production of this state, regardless of the place of sale or the fact that delivery may be made to points outside the state."

Subsequently the Legislature increased the tax levied by the section above quoted by .3 of the tax imposed thereby. It will be noted that the rate imposed by the original act was 6% which, with the increase, would make the rate 7.8%. This was the law in effect at the time of the passage of the act of the legislature in question.

The United Fuel Gas Company, being engaged in the development of properties for natural gas, had the view that in a case where the owner of the land was jointly interested with it in the production of natural gas, i.e., where the land owner received a part of the production or the proceeds arising there-

from as his compensation, the tax should be borne ratably by it and the said land owner. With the view of testing this question, the United Fuel Gas company paid to one of its land owner lessors the compensation provided for in the lease less the one-eighth part of the taxes assessed against the same, the interest of the said land owner being one-eighth of the said production. This contention was not acquiesced in by the land owner and a suit was brought to recover the amount so deducted. In this suit it was held by the Supreme Court of Appeals of West Virginia that the tax was levied against the party carrying on the operations on the lands and that no part thereof was levied against the land owner, and permitted the recovery of the part so deducted and withheld.

Kanawha Valley Bank v. *United Fuel Gas Company*, 121 W. Va. 96. This case was decided on February 28, 1939. The Legislature of West Virginia was then in session and that body evidently conceiving that the imposition of all of the tax upon only one of the parties who was interested in the production was not fair, undertook to pass an act imposing tax ratably on all parties interested in the production of the land. The result of this was the passage on March 11, 1939 of Chapter 127 of the Acts of the Legislature of 1939. The text of this act follows:

> "Be it enacted by the Legislature of West Virginia:
>
> "That article thirteen, chapter eleven of the code of West Virginia, one thousand nine hun-

dred thirty-one, be amended by adding thereto a new section, designated section two-j, to read as follows:

"Section 2-j. *Production of Oil and Gas; Measure of Tax; Deductions; Exceptions.* Every person engaging or continuing within this state in the business of severing oil, natural gas or petroleum products from the strata of the earth, or of operating oil or gas properties, shall use as the measure of the tax imposed by section two-a of this article the value of the entire production, with no deduction by reason of payments under contracts or agreements requiring payment, either in money or in kind, to the owners of the royalty interest, excess royalty or working interest in such properties, where such payments are made in kind, the market value of the natural resource product or other thing so paid, at the time of payment, shall be included in the measure of said tax. Every person who is hereby required to pay said tax measured by the entire production of the property operated, is hereby authorized and empowered to deduct from any payment, in money or in kind, to the owners of any royalty interest, excess royalty or working interest in such properties, that proportion of the tax paid which the said royalty, excess royalty or working interest bears to the entire production; and there is hereby levied upon such royalty interest, excess royalty or working interest, such proportionate part of the tax imposed by said section two-a. The exemption of five thousand dollars granted to producers of natural gas, by said section two-a, shall be for the benefit of the owners of such royalty interest, excess royalty or working in-

terest in the same proportion which the said royalty interest, excess royalty or working interest bears to the entire production, and the balance of said exemption shall be for the benefit of the person operating such properties.

"No person shall be required to pay the tax imposed by section two-i of this article, upon income which is included in the measure of the tax imposed upon the production of oil, natural gas or other petroleum products by section two-a of this article."

In 1924, respondents executed a lease upon their lands for the purpose of having the same exploited and developed for the production of oil and natural gas. This lease became the property of petitioner. It provided, among other things, that if oil or gas were discovered, the lessor should receive one-eighth of such production as compensation for their contribution to the enterprise. Operations carried on by petitioner upon the land resulted in substantial production of natural gas.

Under the authority of this act of the Legislature, petitioner paid to the State of West Virginia the tax levied against the natural gas produced from the lands of the respondents and, after deducting the amount of this tax, paid to the land owner one-eighth of the balance, that being the proportion to which they were entitled under the lease. The lessor land owners protested the right of petitioner to pay the tax levied by this act out of their monies and brought this suit in the Circuit Court of Kanawha County, West Virginia, for the purpose of recovering the

amount so paid by petitioner under the said act. Lessor Land owners' notice of motion for judgment stated the amount withheld. It was stated that this amount was withheld by virtue of the Act of Legislature above referred to and that it was the amount of taxes for which they were liable if the act of the Legislature assessing said tax were valid. It was averred that the amount of said taxes had been paid by the petitioner to the said State of West Virginia, but it protested that petitioner was not justified in paying said sum under the provision of Chapter 127 of the Acts of 1939 aforesaid for the reason, among other things, that said Act of the Legislature was invalid under the provisions of the United States Constitution, and particularly because it impaired the obligation of the contract of lease between petitioner and lessors in violation of Section 10 of Article I of the Constitution of the United States. It was also contended that the act was invalid because of insufficiency of the title thereof, because it delegated legislative powers to petitioner and also because it made an unlawful classification of subjects for taxation.

All of the facts involved thus appearing on the face of the pleading, the case was submitted to the Circuit Court of Kanawha County on a demurrer to said pleading. That Court sustained said demurrer and held the said act to be a valid and binding act. This conclusion was certified by the Court of first instance to the Supreme Court of Appeals of West Virginia where the same contentions were made as to the invalidity of said act. On June 26, 1945, said Court handed down an opinion in which

it held the act invalid as being in violation of Section 10 of Article I of the Constitution of the United States which, among other things, prohibits the passage of any act impairing the obligation of a contract. That Court also discussed as to whether or not the title of the act was sufficient under the provisions of Section 30 of Article 6 of the Constitution of the State of West Virginia. The other questions asserted against the validity of the act were not decided by the Supreme Court of Appeals of West Virginia. The conclusion of the Court is expressed in the following paragraph from its opinion:

> "We hold, therefore, that the imposition of a tax upon royalty was invalid and of no effect; and that the remaining provisions of Section 2j, Chapter 127 of the Acts of the Legislature, 1939, are unconstitutional and void because they impair the obligation of the original contract of lease entered into on March 18, 1924. It follows that the ruling of the Circuit Court of Kanawha County should be reversed."

It will be seen from this quotation that the conclusion of the Supreme Court of Appeals of West Virginia is based upon its holding that the act complained of impaired the obligation of the contract between petitioner and respondents. Petitioner filed a petition for rehearing in the said Supreme Court of Appeals of West Virginia within the time required by the rule which petition was denied by that Court on the 10th day of September, 1945.

Petitioner says that the Supreme Court of Appeals of West Virginia was in error in holding that

the said act of the Legislature of West Virginia, Chapter 127 of the Acts of 1939, was and is invalid because it impairs the obligation of the contract between petitioner and respondents.

Petitioner claims the right to review the said judgment of the said Supreme Court of Appeals of West Virginia under the provisions of sub-section B of Section 237 of the Judicial Code as amended (28 U. S. C. A. Sec. 344).

A certified copy of the record from the Supreme Court of Appeals accompanies this petition.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Appeals of West Virginia commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named a transcript of the records and proceedings therein; and that the judgment of the Supreme Court of the State of West Virginia be reversed by this Honorable Court and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

A brief in support of this petition is attached hereto to which the attention of the Court is called.

HAROLD A. RITZ,
FRANK LIVELY,
Counsel for Petitioner,

SUPPORTING BRIEF

The facts involved sufficiently appear from the attached petition.

Prior to the enactment of the statute, the validity of which is questioned herein, the Legislature of West Virginia, as it appears more fully from the opinion of the Court in this case, levied certain taxes upon the business of engaging in the production of oil and natural gas. The rate prescribed for this class of business, including the surtax imposed thereon, was 7.8%. By the same act, the Legislature also imposed a tax upon the business of receiving rents and royalties, the rate thereof being 1%. Petitioner and respondents were engaged in the joint enterprise of producing the natural gas from respondents' property and the proceeds arising from such development was divided between them on the basis of one-eighth to respondents and seven-eighths to petitioner. The Legislature evidentally had the view that inasmuch as respondents were jointly interested with petitioner in the production of the natural gas, the burden of taxation should be imposed upon them in the proportion in which they were interested in the enterprise. This was attempted to be accomplished by putting the respondents in the same classification for the purpose of taxation as petitioner and imposing upon their respective interests the same rate of taxation, and after doing this, it proceeded by the last paragraph of the act to remove respondents from the classification in which they were formerly placed. The Legislature evidentally conceived that the equitable thing to do

was to impose an equal burden of taxation upon those similarly situated or those receiving similar benefits from the particular subject of taxation, and it would seem that this conclusion was perfectly logical and reasonable. The act of the Legislature in question may not be as artistically drawn as it might be, but there can be no question that the whole purpose and effect of it was, and is, to impose a tax on the production of natural gas on the parties who receive that production, and the Supreme Court of Appeals of West Virginia, in the opinion of this case, clearly recognizes that this is what the Legislature attempted to do. The Court, however, finds that the Legislature had, in the previous act, placed respondents in a different classification from petitioner, and having said in the former act that respondents belonged in that classification, it is not within the legislative competence to make a reclassification. If such a doctrine were established, it would make it impossible for the Legislature to ever benefit from experience for having once said that a particular subject of taxation belonged in a particular class, it could never change this classification no matter how effectually experience might demonstrate that it was in error.

It is a little difficult to determine exactly upon what grounds the Supreme Court of Appeals of West Virginia based its conclusion that the act of the Legislature in question violates the contract clause of the Constitution. A careful review of the opinion leads to the conclusion that it is based upon the court's view that this case is controlled by *Kanawha Valley Bank* v. *United Fuel Gas Company*, 121 W.

Va. 96, notwithstanding the fact, as stated by the Court, that this act was passed for the very purpose of modifying the law as declared in that case. The Court, however, holds that the act in question was not effective to change the classification in which respondents are sought to be placed by the Act of 1939. The Court in its opinion says:

> "We are not convinced that the Act of the Legislature aforesaid operated to nullify the decision in the *Kanawha Valley Bank* case. There has been no change in our statute with respect to the point decided therein. The Legislature has placed the producer of oil and gas and the owner thereof in two different classifications. It has imposed upon the producer a relatively heavy tax and a surtax; and it has classified the owner of the oil and gas who leased the same as being engaged in the business of collecting incomes from the use of real estate or personal property, and did so by Section 2-i of Article 13."

The reasoning of the Court seems to be that because the Legislature formerly classified taxpayers occupying the position of the respondents in a different class from those occupying the position of petitioner the effort to reclassify those taxpayers occupying the position of respondents and impose upon them a heavier burden of taxation than was theretofore imposed, was ineffectual. The conclusion of the Court from a reading of the whole opinion seems to be based uopn the one proposition that when the Legislature classified these particular businesses for the purpose of taxation, it had exhausted its power in that regard and could not thereafter change

the classification. In this the Court is manifestly in error. The Legislature, of course, has as much power to place the taxpayers in another classification, if it were appropriate, as it had to originally classify them and the fact that it had once exercised the power of classifying the taxpayers did not exhaust its power to change its classification.

This is the same contention that was made, and insisted upon, in the case of *Barwise* v. *Shepard*, 299 U. S. 33, 81 L. Ed. 23. In this case, prior to the passage of the act, the validity of which was questioned, the Texas Legislature imposed a tax upon those engaged in the production of oil and natural gas, which the Supreme Court of Texas held must be borne in its entirety by the lessee in an oil and gas lease. This was exactly the situation existing in West Virginia prior to the passage of the act under consideration and in the case of *Kanawha Valley Bank* v. *United Fuel Gas Company*, 121 W. Va. 96, it was held that this tax must be borne entirely by the lessee. In this situation the Texas Legislature, by the act challanged in the *Barwise* case, just as did the West Virginia Legislature by the act challenged here, put the lessor in the same classification as the lessee and provided that the tax should be borne by the parties interested in the production in accordance with the ratio of their respective interests. There was no additional money collected under the Texas statute but simply a readjustment, having for its purpose the imposition of the burden upon the parties deriving the benefit and this is exactly what the West Virginia statute undertook to do.

In that case, just as in this, it was insisted that the statute violated that clause of the Constitution which forbids the impairment of the obligation of a contract. The Court had no trouble, however, in disposing of this contention. It said, in effect, that no contract could limit the power of the State to levy taxes upon the businesses carried on in the State or classify those businesses for the purpose of taxation saying at page 40 (page 27 of the L. Ed.):

> "It is true that the law in force when the lease was made and for some years thereafter laid a production tax on the lessee alone, and it is equally true that under the act of 1933 a part of the tax is imposed on the lessor and the part imposed on the lessee is less than what would fall on him under the earlier law. But the State's power in the matter was in no way circumscribed by the earlier law. That law was subject to change at any time through a further exertion of the taxing power; and the lease presented no obstacle to such a change."

The West Virginia Supreme Court of Appeals attempts to avoid the effect of the *Barwise* case upon the theory that the tax levied in that case was a production tax while the tax attempted to be imposed in this state is what the Court calls a privilege tax. This appears from the following excerpt from the Court's opinion:

> "We have no quarrel with that statement of the law, but they were dealing with a production tax on oil, which extended to all interests therein, including royalty interests. We have no production tax. Our Legislature

> has studiously avoided imposing a production tax, and has resorted to the imposition of a privilege tax, * * *"

Assuming that there is such a refinement as the Court tries to draw between a production tax and a privilege tax, it is difficult to see why the power of the Legislature would be limited in the one case to the point of forbidding it to reclassify taxpayers while it would possess that power in the other. If there is any difference between what the Court terms a privilege tax and what it calls a production tax, it arises from the fact that a privilege tax is levied upon the theory that the taxpayer is exercising some sort of privilege granted to him by the State, such as carrying on the business of a public utility. The tax involved here, however, has none of the characteristics of a privilege tax, and the very language of the act negatives this contention. It says:

> "Upon every person engaging or continuing within this State in the business of producing for sale, profit, or commercial use any natural resource products * * *".

It is clear here that the tax is laid not on any privilege exercised by the taxpayer under authority from the State, but is imposed simply upon the business of using his own property. We do not think that by calling the tax imposed a privilege tax, it in any way defeats the power of the Legislature to make the classification which it undertook to make by the act in question.

It may be contended that the Supreme Court of West Virginia, in addition to holding this act invalid as violating the obligation of the contract between petitioner and respondents, also held that the act was invalid for the reason that the subject matter of the act was not embraced within the title. In view of the conclusion reached by the Court as expressed in the quotation contained in the petition hereto annexed, it may well be doubted whether the question of the title of the act was at all passed upon by the Court. It is not stated as a ground upon which the act is held invalid. Assuming, however, that the Supreme Court of Appeals of West Virginia did hold the act invalid because the subject matter of it was not germane to the title, it does not necessarily follow that the question of constitutional validity of the act may not be reviewed by this Court. It is quite true that this Court will not review a decision of the State Court even though a federal question may be there decided when the decision of that State Court is also based upon a non-federal ground adequate to its support. This doctrine, however, like most generalizations, is subject to certain limitations.

In the case of *Enterprise Irrigation District* v. *Farmers Mutual Canal Company*, 243 U. S. 157 61 L. Ed. 644, this Court held at page 164 (page 649 L. Ed.):

> "But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain."

This doctrine was reaffirmed by this Court in the case of *Abie State Bank* v. *Bryan*, 282 U. S. 765—75 L. Ed. 690.

In *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537—74 L. Ed. 1023, this Court held at page 540 (page 1030 L. Ed.):

> "Even though the constitutional protection invoked be denied on non-federal grounds it, is the province of this Court to inquire whether the decision of the State Court rests upon a fair or substantial basis."

This declaration is approved by this Court in the cases of *Lawrence* v. *State Tax Commission*, 286 U. S. 276—76 L. Ed. 1102, and *Ancient Egyptian Arabic Order* v. *Michaux*, 279 U. S. 737—73 L. Ed. 931.

It would seem from these holdings that where the non-federal ground is so interwoven with the other ground relied upon that the two cannot be separated, in other words where the non-federal ground depends upon the other or where it is simply colorful, this Court will review the lower Court's decision. This doctrine has peculiar application to the Court's opinion in this case. What it has said in regard to the title of the act is simply this—that the title of the act does not embrace the subject matter of it for the reason that the subject matter of the act is not germane to the title, and the reason that it is not germane to the title is that it is not a taxing act at all in that it violates the contract clause of the Constitution of the United States. It is quite apparent that, if

the Supreme Court of Appeals of West Virginia had held that the act in question was a valid taxing act and did not violate the contract clause of the Constitution, it would have also held that the title was entirely sufficient. It would seem, therefore, that this holding, if it be a holding, is based entirely upon the holding of invalidity under the contract clause and is not an independent ground for holding the act invalid. It seems to us, therefore, that what is said in the opinion in regard to the title of the act, if it be construed as a holding thereon, is still so interwoven with, and made part of the principal decision that the act violates the contract clause that it will not preclude a review of that holding by this Court.

HAROLD A. RITZ,
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Attorneys for Petitioner.

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versus

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BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATEMENT OF THE CASE

By a written lease made March 18, 1924, respondents leased land lying in West Virginia to one C. A. Croft for oil and gas purposes in consideration, inter alia, of Croft's covenant to pay respondents one-eighth of the proceeds from the sale of the natural gas produced from the leased land, and in no case less than one cent for each one thousand feet of gas produced. Prior to June 1, 1939, petitioner, through mesne assignments, became the owner of Croft's rights and assumed all of his obligations under the lease. A number of producing gas wells were drilled

on the leased land by petitioner or its predecessor in title. Until June 1, 1943, they paid the full amount of the rental agreed upon, and thereby complied fully with said covenant. However, petitioner failed and refused to pay a substantial part of the agreed rental which accrued for the months of June, July and August, 1943, claiming the right to withhold such payment because the sum withheld equalled one-eighth of certain occupation taxes which were paid by petitioner, and which were imposed upon petitioner by Sections 2-a and 3-a, Article 13, Chapter 11 of the Code of West Virginia, for the privilege of engaging in the business of producing natural gas. Respondents brought suit to recover the unpaid rentals and petitioner demurred to respondent's complaint and set up as its authority for paying less than the rentals agreed upon in the lease, Chapter 127 of the Acts of the 1939 Legislature of West Virginia (now Section 2-j, Article 13, Chapter 11, Code of West Virginia). The validity of said Section 2-j was thus put in issue. The trial court upheld the act, but on its own motion certified to the Supreme Court of Appeals of West Virginia the question of whether or not its ruling was correct. The Supreme Court of Appeals of West Virginia decided that the act was unconstitutional and void because it was in violation of Section 30, Article VI of the Constitution of West Virginia, and also because it was in violation of Section 4, Article III of the Constitution of West Virginia and Section 10, Article I of the Constitution of the United States.

Respondent's complaint (called a "Notice of Motion for Judgment" under the West Virginia statute) will be found on pages 3 to 12 of the record. The lease is set forth in the complaint, and will be found on pages 4 to 8 of the record. Petitioner's demurrer appears at pages 15 to 18, and the above mentioned statutes, which are copied into the opinion of the Supreme Court of Appeals of West Virginia, will be found on pages 24 to 26 of the record.

Prior to the passage of the questioned act (Chapter 127 of the Acts of the 1939 Legislature of West Virginia, now Section 2-j, Article 13, Chapter 11, Code of West Virginia), Article 13 of Chapter 11 of the Code of West Virginia imposed taxes upon certain persons for the privilege of engaging in certain occupations or businesses, such as the business of manufacturing, the business of selling tangible property, the business of operating a utility, the business of contracting, the business of making industrial loans, the business of operating a theater, the business of collecting incomes, the business of producing natural gas for sale, etc. The language of the statute with respect to the privilege of engaging in the last named occupation or business being—

> "There is hereby levied and shall be collected annual privilege taxes * * upon every person engaging or continuing within this state in the business of producing for sale, profit or commercial use any * * natural gas * *." (R. 24)

This type of taxation was first adopted in West Virginia in 1921 under the authority of Section 1, Article X of the Constitution of West Virginia, which permitted the Legislature to tax privileges (R. 32). At that time, the Legislature discarded the idea of a production tax, i. e., a tax based on the ownership of the thing produced, in favor of a tax on the privilege of engaging in certain occupations some of which result in the production of commodities and others do not; and the Legislature has adhered to that choice (R. 32).

In 1938 a West Virginia oil and gas operator undertook to shift to its lessor part of the tax imposed upon it for the privilege of engaging in the oil and gas business by said Section 2-a. The question of its right to do so reached the Supreme Court of Appeals of West Virginia early in 1939 in the case of *Kanawha Valley Bank v. United Fuel Gas Company*, 121 W. Va. 96. That Court held

that the gas operator had no right to make any deduction from the rental or royalty provided for in the lease because of taxes paid by the operator for the privilege of engaging in that occupation. The necessary effect of the West Virginia decision was that the land owner (the lessor) was not engaged in a joint enterprise with the lessee in producing natural gas; nor was the land owner in any sense engaged in that occupation. The Court cited *Norum v. Oil Co.*, 83 Mont. 353, 272 P. 534, with approval. In that case the Montana Court described a similar tax as—

> " * * An occupation license tax, as distinguished from a property tax, and applies only to persons *engaged* in the *business* of producing oil. The owner of the land, as such, is not engaged in the *business* within the purview of the act. He merely grants a right to the operator to engage in such business upon his land. Under the lease, the well is drilled and the oil produced therefrom by the operator, not by the land owner, and the well is subject to the exclusive control of the lessee so long as he performs all of the conditions of the lease." (Emphasis by the Court.)

The West Virginia Court again cited the *Norum* case with approval in the case at bar.

Not long after the *Kanawha Valley Bank* decision, the West Virginia Legislature passed the act in question as an amendment to said Article 13, Chapter 11 of the Code of West Virginia. This amendment undertakes to authorize persons engaging in the occupation of producing natural gas to deduct from royalty owing by them to their lessors that portion of the taxes imposed upon them by said Section 2-a for the privilege of engaging in that occupation, and paid by them, which said royalty bears to the entire production from the leased land. It then provides " * * There is hereby levied upon such *royalty interest* such proportionate part of the tax imposed (upon the lessee operator) by said Section 2-a." (The words in parentheses and the emphasis supplied by us).

This is the act (R. 25, 26) relied upon by petitioner as its authority for withholding part of the rental or royalty which it has agreed in said lease to pay to respondents.

The validity of this act was attacked by respondents in the West Virginia Court on several grounds. One was that the act is bad because it is in violation of Section 30, Article VI of the West Virginia Constitution, which provides in part—"No act hereafter passed, shall embrace more than one object, and that shall be expressed in the title." Under this constitutional provision an act amending a former act need not repeat the title but may refer to the chapter, article and section of the Code where the former act is to be found. But the amendment must be germane to the original act for, " * * if foreign to the prior legislation, it would violate that clause of the Constitution saying that an act shall have but one object." *(Roby v. Sheppard*, 42 W. Va. 286, see also R. 32, 33).

In the case at bar the Supreme Court of Appeals of West Virginia decided that the 1939 act was in violation of the above mentioned section of the West Virginia Constitution because the original taxing statute, which is now Article 13, Chapter 11 of the West Virginia Code, and which the 1939 act purported to amend, created a system of taxation whereby taxes are imposed for the privilege of engaging in certain occupations, (R. 32), whereas the 1939 act (if its real intent was to levy any tax at all) undertook to levy a tax "upon such royalty interest" which is a tax upon property rather than upon the privilege of engaging in an occupation. Such a tax is not germane to a privilege tax and may not be included in the same statute or an amendment thereto. Also the title to the act fails to express properly this new object. This disposed of the case and the opinion need not have gone farther.

That this is the principal basis of the decision of the West Virginia Court appears, not only from the opinion

itself, which will be hereinafter discussed in the argument, but from the first two points in the syllabus, written by the Court, in compliance with a requirement of the Constitution of that State. This syllabus is the law of the case. It contains three points and the first two show beyond question that the primary reason for the decision is the violation of Section 30 of Article VI of the West Virginia Constitution.

Another ground upon which respondents attacked the validity of said act was that it impairs the obligation of the contract between respondents and petitioner, and thereby violates the provisions of Section 4 of Article III of the West Virginia Constitution, which provides in part "No * * law impairing the obligation of a contract * * shall be passed," and also Section 10, Article I of the Constitution of the United States. The West Virginia Court having concluded that the act violates Section 30 of Article VI of the West Virginia Constitution because it attempts to combine in one statute the imposition of two separate and distinct, and wholly unrelated, kinds of taxes, went on to find that the statute was nothing more than a barefaced attempt to change the terms of the contract beween the petitioner and respondents and, therefore, was in violation of the contract clauses of the West Virginia Constitution, and of the United States Constitution. This conclusion is stated in the third and last point of the Court's syllabus.

ARGUMENT

Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, and the latter, independent of the former, is sufficient to sustain the judgment, the Supreme Court will not take jurisdiction.

This Court has said in *Lynch v. New York ex rel. Pierson*, 293 U. S. 52:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. (Citing cases) Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." (Citing cases)

An examination of the opinion of the West Virginia Court discloses that the non-federal ground of the decision is not only sufficient to sustain the judgment, independent of the federal question, but that the non-federal ground, namely the violation of Section 30, Article VI of the West Virginia Constitution, is the primary basis for the decision.

The opinion points out that Article 13, Chapter 11 of the West Virginia Code imposes a tax upon the privilege of engaging in certain occupations or businesses, and that " * * beginning in 1921, when the system of indirect taxation was first adopted in this state, the idea of a produc-

tion tax on natural resources was discarded, * * . Certain it is that in our system of indirect taxation we have taken the safe and sure way of taxing privileges as expressly authorized by the Constitution, instead of embarking on a system which might give rise to certain questions concerning equality, uniformity and questions of like nature." (R. 32) "We have no production tax. Our legislature has studiously avoided imposing a production tax, and has resorted to the imposition of a privilege tax, whereby persons, firms and corporations are classified according to the business in which they are engaged, and a tax collected from the gross proceeds of their business rather than upon any product which they may produce from the earth or manufacture or process." (R. 35)

In other words said Article 13 imposes an excise tax upon the privilege of engaging in certain occupations or businesses. It does not impose a tax upon the thing produced or a tax based upon the ownership of the thing produced. Most of the occupations taxed by that article do not even result in the production of a commodity; for example, making industrial loans, contracting, operating a theatre, selling tangible property, collecting incomes, etc. This then is the theory of taxation carried out in said Article 13.

The Court points out that the farmer or other person who leases his land to an oil and gas operator whereby the latter acquires the right to explore for oil and gas and to remove it, if found, from the land, does not thereby engage in the business or occupation of the oil and gas operator. *(Kanawha Valley Bank v. United Fuel Gas Company, supra; Norum v. Oil Co., supra; Freidrich v. Wright*, 386 Ill. 229, 53 N. E. 2d 974; *Ohio Oil Co. v. Wright*, 386 Ill. 206, 53 N. E. 2d 966; see also page 3, *supra.)* Generally speaking, the oil and gas lessor " * * parts with every vestige of control over the production of oil and gas in the property he leases." (R. 28)

Thus it may be inferred that the legislature, even if it attempted to do so, could not convert a lessor into an oil and gas operator, contrary to the fact, and make him pay taxes for the privilege of engaging in a business in which he does not engage, although it may, of course, tax him for engaging in any business in which he does engage, such as leasing land, receiving income, etc. "The legislature does not have the power to declare that not to be a fact which everyone knows is a fact; and * * by the same reasoning, cannot legislate that to be a fact which everyone knows is not a fact." (R. 28)

But this point does not appear to be necessary to the decision of the case because the Court rightly found that the only taxing provision in the questioned act constituted an attempt by the legislature "to lay a tax on the lessor's interest in accrued royalties * * * " which are personal property, and if personal property, can only be taxed in accordance with the provisions of law covering other classes of personal property. (R. 29) The 1939 Act provides that the oil and gas operator, having paid the tax imposed upon him (but not upon the lessor) by said Section 2-a for the privilege of engaging in the business of producing and selling oil and gas, may deduct part of what he has paid from rental which he has contracted to pay his lessor. The Act then provides " * * * and there is hereby levied upon such royalty interest * * such proportionate part of the tax imposed (upon the oil and gas operator, not the lessor) by said Section Two-a." (The parenthetical phrase inserted by us). The Court held: "What the Act attempts is to levy a tax upon accrued royalty." (R. 32) "The legislation under attack in this case attempts to impose a direct tax upon royalty." (R. 33) The court posed the question: "How in the guise of an amendment to Article 13 of Chapter 11 of the Code can a tax be imposed upon accrued royalty?" (R. 32) And the Court said, "The taxation of oil and gas is entirely outside the purpose of Article 13, the law being amended. In our opinion the ef-

fort to impose a tax upon royalty interest was futile and no tax was imposed." The Court said that this disposed of the contention that the enactment of the tax is covered by the title to the act. (R. 33) The Court concluded: "We hold, therefore, that the imposition of a tax upon royalty was invalid and of no effect * * " because the act undertook to levy a tax upon personal property rather than upon the privilege of engaging in an occupation and, therefore, ran counter to the provisions of Section 30, Article VI of the West Virginia Constitution. And at another point, the Court made the following statement of the grounds upon which its judgment is based—"We hold that the Legislature had no constitutional right to make such an enactment for two reasons: First: There is nothing whatever in the title of the bill to give any notice or intimation that the purpose thereof was to make an apportionment of the tax accruing under Section 2-a * * * ." (R. 31)

Finally, the Constitution of West Virginia (Section 5, Article VIII) requires the Supreme Court of Appeals of that State to state the reasons for its decisions concisely in writing and to prepare "* * * a syllabus of the points adjudicated, in each case concurred in by three of the judges thereof, which shall be prefixed to the published report of the case." *In West Virginia this syllabus is the law of the case.* In compliance with the Constitution, the West Virginia Court wrote a syllabus in the case at bar containing three points. The first two are as follows:

"Syllabus by the Court

"1. Where a statute is sought to be amended by the Legislature, and the title to the act refers to the statute being amended by chapter, article and section without further reference to the purposes thereof, the enactment must be germane to the purposes of the original act, and where it goes beyond that purpose is invalid under Sec-

tion 30, Article VI of the Constitution of this State, requiring the object of the act to be stated in the title thereof.

"2. A tax on royalty accruing from an oil and gas lease may not be constitutionally laid by an act purporting to amend a statute imposing a tax on the privilege of engaging in certain businesses and occupations, because not germane thereto." (R. 21)

This should be an end of the matter, but we feel justified in commenting briefly on certain statements made by counsel for petitioner in their brief. They say that the decision of the West Virginia Court is based upon "* * * the one proposition that when the Legislature classified these particular businesses for the purpose of taxation it had exhausted its power in that regard and could not thereafter change the classification." The substance of this statement is repeated throughout the brief. It misses the mark completely. The West Virginia Court held nothing of the kind. It held that the 1939 amendment does *not* change the classification of the lessor, (R. bottom p. 28) but attempts to assess part of the tax imposed upon the lessee for the privilege of engaging in the lessee's occupation upon personal property owned by the lessor, i. e. "such royalty interest." Passing by the question of whether or not this could be done by proper legislation, the Court found that it could not be done by an amendment to the West Virginia statute imposing taxes for the privilege of engaging in certain occupations because not germane thereto and hence in violation of the West Virginia Constitution.

Counsel for petitioner also say that the act in question imposes "a tax on the production of natural gas on the parties who receive that production." Both occupation taxes and production taxes are excise taxes, but the former are based solely upon the activity of the person taxed, whereas the latter has no relation to activity or

occupation; it is based solely upon ownership of the thing produced. Obviously the two taxes are fundamentally different in character and could not be combined in one act under the West Virginia Constitution. If counsel intend to say that the supposed tax is on the gas produced, or on "such royalty interest," as the act provides, obviously the provision cannot stand as an amendment to Article 13. If they intend to say that the amendment was intended to reclassify the lessor and make him an oil and gas operator, and thereby tax him under Section 2-a, they run counter to the plain language of the act itself. If that had been the intention of the Legislature it could easily have said so, but the language of the act cannot be read so as to justify that conclusion. It simply does not so provide. It makes no such statement, but on the contrary undertakes to levy a part of lessee's occupation tax "upon such royalty interest." We think the legislative intent must be gotten from the wording of the act alone, and not from something not appearing in it. We think what the legislature did, rather than what counsel thinks it might have done, or could have done, quite properly guided the Court in the construction of this statute. Obviously the West Virginia Court could not, with justification, have reached any other conclusion than the one it did reach. Its construction of the West Virginia statute, with certain limitations, is binding upon all other courts *(Willoughby on the Constitution of the United States*, 2nd Ed., Volume 2, page 1300, and cases cited).

Counsel assert, as if it were an undisputed fact, that —"Petitioner and respondents were engaged in the joint enterprise of producing the natural gas from respondents' property * * . " This statement is not correct. Petitioner was engaged in the business of producing natural gas, but respondents were not. *(See Kanawha Valley Bank v. United Fuel Gas Company, supra; Norum v. Oil Co., supra; Freidrich v. Wright, supra; Ohio Oil Company v. Wright, supra;* and pages 3 and 8 above.)

In discussing the case of *Barwise v. Sheppard*, 299 U. S. 33, counsel erroneously assume that the West Virginia Legislature undertook in the 1939 act to "reclassify" lessors, and they say that the West Virginia Court decided that the Legislature had no right to do so. We have already demonstrated, we think, that the act attempts no change in the classification of lessor, and that the West Virginia Court made no such decision.

No question similar to the one arising under Section 30, Article VI of the West Virginia Constitution arose in the *Barwise* case. It may be noted too that the Texas statute which was before the Court in that case levied a tax based upon the ownership of the oil produced; the statute was not concerned with the activity or occupation of anyone; ownership of the oil alone fixed the tax. It was called a production tax. But by whatever name it may be called, it is not the same tax, nor the same type of tax, as a tax imposed upon the privilege of engaging in certain occupations. The tax was "* * charged ratably against all who have an interest in the oil produced." (See 229 U. S. at page 37; see also R. 35). In the case at bar the West Virginia Court simply held, among other things, that under the Constitution of that State these two types of taxes may not be combined in the same act. When the title of an act states its object to be the imposition of taxes for the privilege of engaging in certain occupations and businesses, that act may not impose taxes on property, or taxes based upon the ownership of property. Obviously that Court did not hold that taxes on property, or based on the ownership of property, may not be imposed by proper legislation which meets the requirements of the Constitution of that State. Certainly all this is a matter for the State of West Virginia. It is not a federal question.

CONCLUSION

We think it clearly appears from the record in this case that the decision of the State Court rests primarily upon the non-federal ground that the 1939 amendment violates that part of the West Virginia Constitution which requires the object of each legislative act to be expressed in the title to the act, and which forbids the inclusion of more than one object in a single act. At least this ground is sufficient to sustain the judgment independent of any question as to the impairment of the contract. Furthermore we are confident that the Court's decision that the contract clauses of the state and federal constitutions were violated is clearly right. We believe it is plain that the act is not a bona fide taxing statute, and that it actually accomplishes nothing, except to benefit the oil and gas operator at the expense of his lessor. But we have not argued that question, feeling confident, as we do, that the decision rests primarily upon non-federal grounds, which alone are entirely sufficient to sustain it. It seems obvious that none of the grounds referred to in Section 5 of Rule 38 of this Court nor in the pertinent federal statute are present here.

It is, therefore, respectfully urged that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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Huntington, West Virginia
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